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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In re Petition of:

ASHLAND INC.

Petitioner,

For Review of Approval of Remedial
Action Plan for Terminal One Property
by the California Regional Water
Quality Control Board, San Francisco
Bay Region

PETITION NO.: _____

**PETITION OF ASHLAND INC. FOR
REVIEW OF SAN FRANCISCO BAY
REGIONAL WATER QUALITY
CONTROL BOARD APPROVAL OF
DRAFT REMEDIAL ACTION PLAN
AND RESPONSIVENESS SUMMARY
FOR TERMINAL ONE PROPERTY;
REQUEST FOR STAY, HEARING
(ORAL ARGUMENT) AND LEAVE TO
PRESENT SUPPLEMENTAL
EVIDENCE (EXPERT OPINION AND
PUBLIC COMMENTS)**

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1 **I. INTRODUCTION**

2 Ashland Inc. ("Petitioner" or "Ashland") hereby petitions the California
3 State Water Resources Control Board ("the State Board") for review of the decision of the
4 California Regional Water Quality Control Board, San Francisco Bay Region (the
5 "Regional Board") in approving the May 2004 Draft Remedial Action Plan ("Draft RAP")
6 submitted by the City of Richmond ("City") and the associated Responsiveness Summary
7 for the Terminal One Site in Richmond, California. Petitioner contends that the Regional
8 Board's approval of the Draft RAP and associated Responsiveness Summary was
9 inappropriate, improper, not supported by the evidence in the administrative record, and
10 outside the scope of the Regional Board's authority under the Water Code. This appeal is
11 brought pursuant to the provisions of Water Code Section 13320 and 23 Cal. Code Reg.
12 2050-2067.

13 This petition challenges the Regional Board action for three primary
14 reasons. First, in approving the Draft RAP for the Site, the Regional Board failed to abide
15 by its own requirements imposed in the Order adopted for the Site on June 16, 2004. In
16 that Order, the Regional Board established the cleanup standards for the soil and
17 groundwater for the Site and directed the City to prepare and submit a Proposed RAP no
18 later than July 19, 2004, consistent with the newly established cleanup standards. Also,
19 the Order provided that the Executive Officer will allow for a 30 day public comment
20 period on the Proposed RAP, prior to considering approval. Accordingly, Petitioner and
21 other similarly situated interested parties relied on the Order's clear mandates and
22 anticipated receiving the Proposed RAP and being allowed to provide their comments
23 within the 30 day public comment period. However, the City did not submit a Proposed
24 RAP as required by the Order. Instead, the Regional Board approved a Draft RAP, which
25 the City prepared and submitted to the Regional Board prior to the Regional Board's
26 establishment of the cleanup standards for the Site, and prior to the Regional Board's
27 adoption of the Order. This petition challenges the Regional Board's action in failing to
28 require the City to prepare and submit a Proposed RAP as required by the Order and

1 allowing Petitioner and other interested parties to provide their comments regarding the
2 Proposed RAP, and instead approving a Draft RAP that was prepared prior to the
3 Regional Board's establishment of cleanup standards for the Site.

4 Second, the Regional Board hastily approved the Draft RAP in less than one
5 day after it received voluminous comments from various parties, as well as new site
6 assessment data submitted by the City. The voluminous comments the City submitted to
7 the Regional Board also included the City's own interpretations of comments the City
8 received from the Petitioner during confidential settlement discussions, which the City
9 submitted to the Regional Board without Petitioner's knowledge or consent. Also, the
10 memorandum through which the City submitted the new site assessment data to the
11 Regional Board on August 3, 2004 specifically stated that the data was presented in draft
12 because the City has "not made a final determination which concentration values, if any,
13 must be flagged." The memorandum also provided that the results of the investigation
14 conducted in another area of the Site will be provided to the Regional Board under
15 separate cover. However, despite the extensive comments the Regional Board received,
16 and the fact that the newly submitted site assessment data was still in draft form and
17 incomplete, the Regional Board hurriedly approved the Draft RAP in less than one day
18 after receiving this information, and prior to receiving the final site assessment data.

19 Third, because of the Regional Board's conduct described above – failing to
20 permit interested parties to provide comments regarding the proposed remedial alternative
21 for the Site and its haste in approving the Draft RAP without adequate evaluation of
22 significant technical issues – the Regional Board approved implementation of a remedial
23 alternative that is not the most suitable alternative for the Site and by far not the most cost
24 effective approach. The Regional Board approved the In-Situ Thermal Desorption
25 ("ISTD") remedial option combined with installation of a vertical vapor barrier.
26 However, based on a thorough evaluation of the environmental conditions of the Site, and
27 taking into consideration the newly established cleanup standards and the new site
28 assessment data, an alternative remedial option discussed below, which neither the City

1 nor the Regional Board adequately considered, can achieve the cleanup standards
2 established in the Order within a suitable timeframe, and at significantly less cost than the
3 ISTD approach.

4 Petitioner is also requesting a hearing before the State Board to present
5 supplemental evidence and legal arguments, pursuant to 23 Cal. Code Reg. 2050.6, in
6 support of its contentions.

7 Pursuant to Water Code Section 13321 and 23 Cal. Code Reg. 2053,
8 Petitioner also requests a stay of the implementation of the remedial alternative proposed
9 in the Draft RAP, pending the State Board's Consideration of this petition.

10 **II. PROCEDURAL AND SITE HISTORY**

11 **A. Background.**

12 The Terminal One site ("Site") covers approximately 14 acres in the City of
13 Richmond, California. The Site is bounded by the San Francisco Bay to the west and
14 south, the Richmond Yacht Club and the San Francisco Bay to the east, and Brickyard
15 Cove Road to the north. It lies within an area comprised of mixed industrial, residential
16 and recreational land use. The City of Richmond and the City of Richmond
17 Redevelopment Agency ("RRA", collectively "City") desire to develop the former
18 terminal into residential and recreational areas. As a result, the City has entered into an
19 agreement to sell the Site to Toll Bros. Inc. for development purposes. The Southwestern
20 Tank Farm ("SWTF") is proposed for redevelopment as a recreational park area. Portions
21 of the SWTF are impacted by volatile organic compounds ("VOCs"). Other areas of the
22 Site have been impacted by petroleum hydrocarbons ("TPH"). The City has asserted that
23 its agreement with Toll Bros. requires delivery of a "clean" site for redevelopment by
24 June 29, 2005.

25 **B. Environmental Conditions and Proposed Remedy.**

26 **1. Current Environmental Conditions of the Site.**

27 The Terminal One Site consists of land historically reclaimed from the Bay.
28 Groundwater occurs below the Site at depths ranging from 3 to 8 feet below ground

1 surface ("bgs"). In the SWTF, the vadose zone consists primarily of surficial granular fill.
2 Groundwater occurs at approximately 6 feet bgs and is high in total dissolved solids
3 ("TDS"), rendering the groundwater not a potential source of drinking water. The Draft
4 RAP defines the bottom of the vadose zone in the SWTF area at approximately 6 feet bgs.

5 Based on the information presented in the Feasibility Study ("FS") the City
6 submitted to the Regional Board in February 2004, the Site is divided into three distinct
7 area for remediation: The SWTF, the Central Area and the Northeast Tank Farm. In
8 addition to these three areas identified in the FS, the City also determined that additional
9 remediation will be needed during development of the Site for soil that is significantly
10 impacted by TPH. Petitioner's assertions in this petition only challenge the validity of the
11 City's recommended remedial alternative for the areas impacted with VOCs in the SWTF.

12 2. The City's Proposed Remedial Alternative.

13 To address one aspect of the historical contamination at the Site, the City
14 selected remediation remedy for the VOCs contamination located in the Southwest Tank
15 Farm Area to be in-situ thermal desorption ("ISTD") through a series of subsurface
16 vertical heaters and vacuum extraction wells. This remedy is described in Alternative 5 in
17 the draft Feasibility Study ("FS") the City submitted to the Regional Board on February 4,
18 2004. ISTD is currently proposed to be installed over an area of approximately 8,836
19 square feet. The FS approximates the cleanup time at approximately 10 months with a
20 capital cost of \$2.67MM, excluding any pre-design investigations, design work or post-
21 remediation monitoring.

22 Alternative 6 in the FS consisted of source excavation and disposal. The
23 limits of the excavation are based on more rigorous soil cleanup levels than those applied
24 to define the remediation area in Alternative 5, and appear to be associated with
25 residential indoor air quality cleanup goals developed in the FS. The plan view extent of
26 the excavation area for Alternative 6 as presented in the FS Figure 13, is considerably
27 larger (28,550 sq. ft.) than the plan view of the area to be remediated in Alternative 5 as
28 presented in the Draft RAP. Also, the City's estimate for the implementation costs for

1 Alternative 6 was more than \$11MM and included a number of activities associated with
2 Site development rather than remediation costs, such as \$1.25 million for demolition of
3 the warehouse. The City's cost estimate for Alternative 6 also included more than \$1.75
4 million in contingency fees.

5 On June 16, 2004, more than four months after the City's Draft FS was
6 completed and more than a month after the City submitted the Draft RAP to the Regional
7 Board, the Regional Board formally adopted cleanup standards for the Site. When these
8 standards and a remediation area more closely corresponding to the area that is presented
9 in Alternative 5 (based on recently established soil and groundwater cleanup levels), are
10 applied to the excavation and disposal alternative, a smaller area than that presented in FS
11 Alternative 6 is delineated, at a corresponding lower total cost for remediation. This
12 smaller area comprises the alternate excavation and removal remedy Petitioner believes
13 should be utilized at the Site.

14 This alternate excavation and disposal remedy ("Alternate Remedy")
15 provides certainty in mass removal of VOCs source areas in both the vadose and saturated
16 zones with two significant advantages over the City's ISTD approach – the work can be
17 completed in a much shorter timeframe and at a significantly lower cost. Based on the
18 existing soil and groundwater data, the excavation remedy could be completed in
19 approximately four weeks of actual field time at a cost that is much less than the cost of
20 the ISTD approach the City is proposing. Additional details regarding this proposed
21 remedial approach will be provided in Petitioner's Alternative RAP, as discussed in more
22 detail below.

23 **C. Adoption of Order No. R2-2004-0045.**

24 On June 16, 2004, the Regional Board adopted Order No. R2-2004-0045 for
25 the Site that established the cleanup standards for soil and groundwater for the Site. The
26 Order also directed the City to submit a Proposed Remedial Action Plan to the Regional
27 Board by July 19, 2004, containing the following components:

28 **a. Results of the remedial investigation.**

- b. Feasibility study evaluating alternative final remedial actions.
- c. Risk assessment for current and post-cleanup exposures.
- d. Recommended final remedial actions consistent with cleanup standards.
- e. Implementation tasks and time schedule.
- f. Public participation plan (i.e. fact sheet, community meeting and public comment period at a minimum).
- g. Self monitoring program.

Task No. 1 of the Order provided that in order to allow adequate public input, the Executive Officer will allow for a 30 day public comment period on the proposed RAP prior to considering approval. Task No. 1 of the Order also provided that depending on the comments received, the Executive Officer may either approve the proposed RAP or bring it to the Board for consideration.

The cover letter the Regional Board Executive Officer sent to the City enclosing the Order also provided that “[t]he Order sets forth cleanup standards for soil and groundwater and requires the [City] to submit and implement a remedial action plan.” (Emphasis added). Also, paragraph 11 of the Order states that the City “will be submitting a draft RAP, to the Board, consistent with Task 1 of this Order. After review by Board staff and presentation to the public for their comment, a final RAP will be prepared for consideration and approval by the Executive Officer.” (Emphasis added).

D. Regional Board’s Approval of the Draft RAP.

The City did not submit a Proposed RAP after the Board adopted the Order, pursuant to Task No. 1 of the Order, and pursuant to the Executive Officer’s June 24, 2004 direction to the City. Accordingly, Petitioner, and other similarly situated interested parties, were not provided with the 30 day public comment period referred to in Task No. 1 and paragraph 11 of the Order. To the contrary, on August 14, 2004, the Regional Board served notice of its approval of the Draft RAP (previously submitted by the City in May 2004, prior to the Board’s adoption of the Order and establishment of the cleanup

standards for the Site) and associated Responsiveness Summary. Petitioner asserts that the Regional Board's approval of the RAP and Responsiveness Summary was arbitrary, capricious and not supported by substantial evidence, for the following reasons.

First, the Board did not comply with its own requirements and directive of the Order in that it did not require that the City submit the Proposed RAP mandated by Task No. 1 of the Order. When the Regional Board adopted the Order on June 16, 2004, directing the City to submit the Proposed RAP no later than July 19, 2004, the Regional Board already received the Draft RAP more than a month earlier. Therefore, if the Draft RAP satisfied the Regional Board's requirements of Task No. 1 of the Order, that directive would not have been included in Task No. 1 of the Order, paragraph 11 of the Order would not have specifically stated that the City will be submitting a draft RAP that will be presented to the public for their comment, and the Executive Officer's June 24, 2004 letter would not have specifically stated that Order requires the City to submit a RAP. Alternatively, if the Draft RAP was intended to satisfy the requirement of Task No. 1 of the Order, the Board should have included a finding in the Order that the Draft RAP was deemed to have satisfied the requirements of Task No. 1. There is no such finding in the Order, which the Regional Board adopted more than a month after receiving the City's Draft RAP.

A review of the requirements of Task No. 1 show that the Draft RAP could not have satisfied those requirements, specifically the Board's mandate that the "recommended final remedial actions be consistent with cleanup standards." This is so because the Draft FS and Draft RAP were completed months prior to the Regional Board's establishment of cleanup standards for the soil and groundwater beneath the Site. In fact, the cleanup standards the Regional Board established by the Order were different than the cleanup standards the Regional Board proposed in a draft of the order distributed only a month earlier. The Draft FS and Draft RAP also used different cleanup standards than those adopted by the Regional Board's Order on June 16, 2004.

1 Second, the Board did not allow Petitioner, and other similarly situated
2 interested parties, the 30 day public comment period referred to in Task No. 1 of the
3 Order. Therefore, the Board deprived Petitioner from the opportunity to review and
4 comment on the Proposed RAP, and by so doing, did not have the opportunity to evaluate
5 comments and concerns of the interested parties relating to the City's proposed remedial
6 option.

7 Third, the Regional Board's approval of the Draft RAP and Responsiveness
8 Summary improperly ignored significant technical issues, as explained in more detail in
9 Petitioner's supporting memorandum of points and authorities. For example, the
10 Responsiveness Summary the City submitted to the Regional Board included the City's
11 own interpretation of comments and positions Petitioner communicated to the City during
12 confidential settlement discussions. Therefore, the Regional Board did not review and
13 evaluate comments received directly from Petitioner.

14 Also, the documents the City submitted to the Regional Board on August 3,
15 2004 — one day prior to the Regional Board's approval of the Draft RAP — included a
16 memorandum summarizing results of site assessment activities the City recently
17 performed. The memorandum stated that the data is labeled "Draft" because the City has
18 "not made a final determination which concentration values, if any, must be flagged."
19 The memorandum also stated that the results of additional assessment activities will be
20 submitted to the Regional Board under separate cover. Yet, the Regional Board approved
21 the Draft RAP less than a day later, without receiving the final site assessment data from
22 the City.

23 Fourth, the remedial option Petitioner proposed is expected to achieve the
24 Regional Board's cleanup goals established in the Order in less time and at less cost than
25 the ISTD remedial approach the City proposed. However, the Regional Board did not
26 adequately evaluate that option prior to approving the ISTD remedial option. Also, the
27 ISTD option was proposed by the City prior to the Regional Board's establishment of the
28 cleanup standards for the Site. In fact, the Regional Board's extremely quick approval of

1 the ISTD option, and its failure to require the City to submit the Proposed RAP that is
2 consistent with the established cleanup standards as required by the Order, confirms that
3 the Regional Board's action in approving the Draft RAP is arbitrary and capricious and
4 not based on the evidence available in the administrative record.

5 The Responsiveness Summary, which included 17 pages of comments
6 submitted by various parties regarding the proposed remedial option, as well as results of
7 additional site assessment activities submitted by Geomatrix on behalf of the City, were
8 submitted to the Regional Board on August 3, 2004. The Regional Board's letter
9 approving the Draft RAP is dated August 4, 2004. Therefore, the Regional Board
10 reviewed these extensive comments and the new site assessment data for less than one
11 day prior to approving the Draft RAP. In contrast, it took the Regional Board several
12 months to review and approve the Remedial Investigation Report and the FS the City
13 submitted to the Regional Board for review. For example, the Regional Board issued a
14 letter dated February 4, 2004 providing comments and conditional approval of a
15 September 2003 Remedial Investigation Report for the Site — more than four months
16 after the report was prepared.

17 This Petition challenges the appropriateness of the Regional Board's
18 approval of the Draft RAP and requests a stay of implementation of the ISTD remedial
19 approach pending the State Board's ruling on this Petition.

20 **III. PETITION FOR REVIEW AND STAY**

21 In accordance with the provisions of Cal. Code Reg. Section 2050(a),
22 Petitioner provides the following information:
23
24
25
26
27
28

1 **A. Petitioner's Name and Contact Information.**

2 The Petitioner is ASHLAND INC. All correspondence regarding this
3 Petition should be directed to:

4 David Anderson
5 Principal Remediation Engineer
6 Ashland, Inc.
7 P.O. Box 2219
8 Columbus, OH 43216
9 Phone: 614-790-3915
10 Fax: 614-790-6232
11 Email: danderson@ashland.com

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13 Senior Group Counsel
14 Ashland, Inc.
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16 Columbus, OH 43216
17 Phone: 614-790-3019
18 Fax: 614-790-4268
19 Email: relampkin-isabel@ashland.com

20 and to Petitioner's counsel:

21 Mary Ellen Hogan, Esq.
22 McDermott Will & Emery LLP
23 2049 Century Park East, 34th Floor
24 Los Angeles, CA 90067-3208
25 Phone: 310-277-4110
26 Fax: 310-277-4730
27 Email: mhogan@mwe.com

28 and to Petitioner's consultant:

29 Bryan Stone
30 URS Corporation
31 2020 East First Street
32 Suite 400
33 Santa Ana, CA 92705
34 Phone: 714-648-2888
35 Fax: 714-667-7147
36 Email: Bryan_Stone@urscorp.com

37 **B. Specific Action of the Regional Board that the State Board is Requested**
38 **to Review and Stay.**

39 Petitioner seeks review of the Regional Board's approval of the Draft RAP
40 and Responsiveness Summary, and seeks a stay of implementation of the ISTD remedial

option proposed in the Draft RAP. The stay is necessary because implementation of the ISTD remedial option, without allowing the interested parties to review the Proposed RAP required by the Regional Board Order, and without allowing the Regional Board to review such comments and make a determination as to the appropriate remediation technology, will result in implementing a remedy that was improperly approved, especially in view of an equally effective, significantly more cost efficient alternative.

For the reasons explained in more detail in the supporting Memorandum of Points and Authorities, Ashland respectfully requests that the State Board rescind the Regional Board's approval of the Draft RAP and Responsiveness Summary. Ashland also requests that the State Board direct the City to submit the Proposed RAP pursuant to Task No. 1 of the Order and direct the Regional Board to allow Ashland and other interested parties to submit comments regarding the Proposed RAP within the thirty day public comment period, pursuant to Task No. 1 of the Order. Implementation of the ISTD remedial option proposed in the Draft RAP should be stayed until all interested parties are afforded an opportunity to provide the Regional Board with their comments regarding the Proposed RAP and until the Regional Board adequately evaluates these comments and determines the appropriate remedial alternative for the Site.

Alternatively, the State Board should rescind the Regional Board's approval of the Draft RAP (or direct the Regional Board to rescind its approval) based on evaluating the comparison of the remedial alternatives presented in the FS, along with Petitioner's comments regarding these alternatives presented in the supporting memorandum of points and authorities. The State Board should also direct the Regional Board to evaluate Petitioner's Alternative RAP and make a determination approving it as the appropriate remedial alternative for the Site based on a thorough evaluation of all the relevant factors.

C. The Date on Which the Regional Board Acted.

August 12, 2004.¹

¹ Although the letter approving the Draft RAP is dated August 4, 2004, the Regional Board did not serve the
LAS99 1363417-2.042995.0018

1 **D. Statement of Reasons the Regional Board's Action Was Inappropriate**
2 **and Improper.**

3 In summary, the Regional Board's action was inappropriate and improper
4 because the Regional Board failed to require the City to submit the Proposed RAP after
5 approval of the Order as required by the Regional Board's own Order, and the Executive
6 Officer's specific directive. By so doing, the Regional Board failed to properly evaluate
7 the various remedial alternatives for the Site, based on the additional assessment data the
8 City submitted to the Regional Board on August 3, 2004, and based on the revised
9 cleanup standards adopted by the Regional Board on June 16, 2004. The Regional Board
10 also failed to provide Petitioner and other interested parties with an adequate opportunity
11 to review the Proposed RAP and provide public comments, as required by Task No. 1 of
12 the Order. Therefore, the Regional Board's approval of a Draft RAP submitted in May
13 2004, that did not take into consideration the cleanup standards and other requirements
14 that the Regional Board adopted for the Site on June 16, 2004, and that did not take into
15 consideration the August 3, 2004 assessment data, was inappropriate, improper, and
16 inconsistent with the Regional Board's own directives in its Order adopted less than two
17 months earlier.

18 A full and complete statement of the reasons the action of the Regional
19 Board was inappropriate and improper, as well as a statement of the points and authorities
20 in support of legal issues raised in the petition, are included in a separate Memorandum of
21 Points and Authorities incorporated herein by reference.

22 **E. The Manner in Which Petitioner is Aggrieved.**

23 Petitioner is an aggrieved person within the meaning of Section 13320 of the
24 Water Code because Petitioner and the City are currently engaged in litigation in Federal
25 Court, the outcome of which will be directly impacted by the Regional Board's failure to
26 adhere to its own directives of the Order. The Regional Board has been aware of the
27 ongoing litigation between the parties since at least May 13, 2004, and Petitioner has had

28 letter to all interested parties until August 12, 2004.

1 several discussions with Regional Board staff regarding this issue. The Regional Board is
2 also aware that in November 2003, the City entered into an agreement to sell the Site to
3 Toll Bros. Inc. ("Toll Bros.") for \$13 million. As part of that agreement, the City
4 voluntarily committed its Redevelopment Agency to conduct an environmental cleanup
5 with the hope that the Regional Board will certify the Site as meeting environmental
6 standards allowing the proposed residential development no later than June 29, 2005. In
7 the pending litigation, the City is seeking compensation from the defendants, including
8 Petitioner, to pay for the voluntary expedited environmental cleanup of the Site to
9 accomplish the \$13 million sale of the Site.

10 In addition to the Regional Board's failure to abide by its own requirements
11 and directives of the Order, and failure to require the City to do the same, the Regional
12 Board's hasty approval of the Draft RAP is arbitrary and capricious because the cleanup
13 alternative the City proposed, and the Regional Board approved, is neither necessary nor
14 cost effective. Instead of being driven by the environmental cleanup standards, which the
15 Regional Board did not adopt for the Site until June 16, 2004 – more than a month after
16 the City submitted the Draft RAP – the timing and method of the proposed cleanup is
17 driven by the deadlines in the City's agreement with Toll Bros. The cleanup standards the
18 Regional Board adopted for the Site in June 2004 can be achieved through an alternative
19 remedial approach that is substantially more cost effective than the remedial alternative
20 proposed by the City, which was proposed prior to completion of the assessment activities
21 on the Site and prior to the Regional Board's adoption of cleanup standards for the Site.

22 Implementation of the remedial approach proposed by the City without
23 conducting an adequate and thorough evaluation of the possible remedial alternatives for
24 the Site will result in performing unnecessary and improper cleanup activities because the
25 City's proposed remedial approach is based on incomplete data and incorrect assumptions
26 and/or conclusions. In addition, due to the City's failure to submit the Proposed RAP
27 mandated by Task No. 1 of the Order, and due to the Regional Board's failure to require
28 the City to comply with that requirement, Petitioner intends to submit an alternative

1 Proposed RAP ("Alternative RAP") to the Regional Board in September 2004.

2 Petitioner's Alternative RAP will take into consideration the latest assessment data that
3 became available on August 3, 2004, and, contrary to the City's Draft FS and Draft RAP,
4 will be based on the cleanup standards the Regional Board adopted for the Site on June
5 16, 2004.

6 To complete the cleanup activities of the Site in a proper and efficient
7 manner, and to avoid duplication of effort or undertaking unnecessary cleanup activities,
8 the State Board must stay implementation of the remedial alternative the City proposed
9 until the State Board makes a decision regarding the issues raised in this Petition. If the
10 State Board does not stay implementation of the remedial alternative the City proposed,
11 implementation of the cleanup activities as proposed in the Draft RAP will result in
12 substantial harm to Petitioner. As explained in detail in the supporting Memorandum of
13 Points and Authorities, Petitioner will suffer significant harm if the stay is not granted,
14 whereas staying implementation of the Order will not cause any harm to the City or other
15 interested parties or the public interest because conditions of the Property do not pose a
16 health risk to the public. Also, significant questions of fact and law exist regarding the
17 Regional Board's failure to follow the requirements and protocols it adopted in its Order
18 only two months earlier. Therefore, the State Board should stay implementation of the
19 proposed ISTD remedial option pending the State Board's resolution of the issues raised
20 by this Petition.

21 **F. Specific Action Which Petitioner Requests.**

22 Petitioner respectfully requests the State Board consider this Petition and
23 consider the additional evidence Ashland will present to the State Board and the Regional
24 Board, including the Alternative RAP which will take into consideration the recent
25 environmental data and which will ensure compliance with the cleanup standards the
26 Board adopted for the Site on June 16, 2004. Petitioner also respectfully requests that the
27 State Board stay implementation of the remedial alternative the City proposed, and
28 remand the matter to the Regional Board with directions to either: 1) Evaluate the

1 Alternative RAP Petitioner intends to submit and all associated public comments
2 submitted to the Regional Board regarding the Alternative RAP during a 30 day public
3 comment period; or 2) Require the City to submit the Proposed RAP mandated by Task
4 No. 1 of the Order, and to evaluate that Proposed RAP and all associated public comments
5 submitted to the Regional Board regarding the Proposed RAP during a 30 day public
6 comment period. After evaluating that information, the Regional Board will be in a
7 position to make a determination as to the appropriate remedial alternative for the Site
8 based on accurate information and appropriate public comments. Finally, Petitioner
9 further requests that the State Board schedule a prompt hearing on the stay request and
10 issue a ruling staying implementation of the ISTD remedial option proposed in the Draft
11 RAP as soon as possible.

12 1. Ashland's Request Complies with the Regulatory Prerequisites For a
13 Stay.

14 Petitioner respectfully requests that the State Board stay implementation of
15 the ISTD remedial alternative proposed in the Draft RAP pending the State Board's ruling
16 on this Petition. The State Board should grant Petitioner's stay request pursuant to Water
17 Code Section 13321 and 23 Cal. Code Reg. 2053 because, as explained in more detail in
18 the supporting Memorandum of Points and Authorities:

- 19 • Petitioner will suffer substantial harm if the stay is not granted
20 because if the remedial alternative proposed in the Draft RAP is
21 implemented at significant costs to complete tasks that are later
22 determined to be unnecessary, unwarranted or not cost effective, the
23 parties will be compelled to engage in protracted litigation to resolve
24 the liability issues related to these costs.
- 25 • Granting the stay will not result in any harm to other interested
26 persons or to the public. If the stay is granted, the Regional Board
27 will have the benefit of the comments of interested parties like
28 Petitioner, as well as the technical approach proposed by Petitioner in

1 its Alternative RAP, which will achieve the cleanup standards for the
2 Site pursuant to the Regional Board Order. The remedial approach
3 Petitioner intends to propose in the Alternative RAP will achieve the
4 cleanup standards the Board adopted for the Site in a suitable
5 timeframe and should enable the City to sell the Site to Toll Bros.
6 pursuant to the agreement with the City. Therefore, granting the stay
7 while the State Board evaluates this Petition will not adversely
8 impact the City's plans to sell the Site to Toll Bros.

- 9 • Substantial questions of fact and law regarding the Regional Board's
10 authority to approve the Draft RAP exist, as follows:
- 11 i) The Draft RAP was prepared and submitted prior to the
12 Regional Board's adoption of the cleanup standards for the
13 Site on June 16, 2004. Accordingly, the Draft RAP was not
14 prepared to achieve compliance with these cleanup standards,
15 which did not exist at the time it was prepared.
 - 16 ii) The Responsiveness Summary the City submitted to the
17 Regional Board regarding the Draft RAP improperly, and
18 without Ashland's knowledge or consent, included the City's
19 own interpretation of Ashland's comments regarding the Draft
20 RAP that were submitted to the City as part of confidential
21 settlement discussions between the parties. The City did not
22 provide Ashland with any notice that it intended to improperly
23 communicate its interpretation of Ashland's comments to the
24 Regional Board. Therefore, the Regional Board did not
25 properly evaluate Petitioner's comments regarding the Draft
26 RAP (because Petitioner intended to provide its comments to
27 the Proposed RAP required by the Order, which the City never
28 prepared or submitted).

1 iii) The Regional Board directed the City, in the Order and in the
2 Executive Officer's cover letter to the Order, to submit a
3 Proposed RAP no later than July 19, 2004. The Order
4 specifically stated that the Proposed RAP shall contain
5 "recommended final remedial actions consistent with the
6 cleanup standards" established by the Order on June 16, 2004.
7 The Order also provided that the Executive Officer will allow
8 for a 30 day public comment period on the Proposed RAP,
9 prior to considering approval. Despite the fact that Ashland is
10 an interested party, which the Regional Board and the City
11 have been aware of for months, the City did not send Ashland
12 a copy of the Draft RAP for Ashland's review so that Ashland
13 can provide comments to the Regional Board. Ashland
14 anticipated, based on the clear directives of the Order, that it
15 will be afforded an opportunity to provide its comments
16 regarding the Proposed RAP after the City submits it to the
17 Regional Board pursuant to Task No. 1 of the Order. The
18 Regional Board failed to abide by the Order requirements, on
19 which Petitioner and other similarly situated interested parties
20 reasonably relied.

21 iv) There are significant questions of law regarding the Regional
22 Board's authority to approve the Draft RAP, which was
23 submitted prior to adoption of the cleanup standards for the
24 Site, and therefore did not take into account these standards,
25 and which did not comply with the requirements of Task No. 1
26 of the Order.

1 **G. Statement of Points and Authorities.**

2 A full and complete statement of the reasons the action of the Regional
3 Board was inappropriate and improper, as well as a statement of the points and authorities
4 in support of legal issues raised in the petition, are included in a separate supporting
5 Memorandum of Points and Authorities which is incorporated herein by reference.

6 **H. The Petition Has Been Sent to the Regional Board and to the**
7 **Discharger.**

8 Petitioner has a list of persons known to have an interest in the subject
9 matter of this Petition that is attached as a Service List. Other than the persons set forth
10 therein, Petitioner is not presently aware of any other persons known by the Regional
11 Board to have an interest in the subject matter of this Petition. Copies of this Petition are
12 also being sent to Bruce H. Wolfe, Executive Officer, California Regional Water Quality
13 Control Board, San Francisco Bay Region, as well as to all persons known to have an
14 interest in the subject matter of this Petition, as listed on the attached Service List.

15 **I. The Contentions Raised in the Petition Were Raised Before the**
16 **Regional Board.**

17 Ashland previously raised most of the contentions raised in this Petition
18 before the Regional Board, or to the Regional Board staff. Ashland also intended to
19 submit all of its contentions regarding the Proposed RAP to the Regional Board upon
20 receipt of the Proposed RAP from the City. However, because the City did not abide by
21 the requirement in the Order to submit the Proposed RAP, and because the Regional
22 Board failed to enforce that requirement and failed to require the City to submit the
23 required Proposed RAP, Petitioner was deprived of the opportunity to present its complete
24 comments regarding the remedial alternatives to the Regional Board. However, Petitioner
25 intends to submit the Alternative RAP to the Regional Board and to the State Board in
26 September 2004.

1 **J. Request for Hearing and Consideration of Supplemental Evidence.**

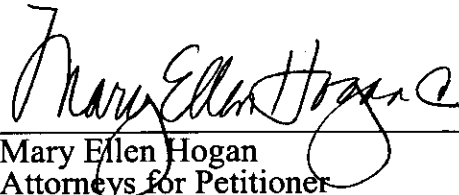
2 Pursuant to 23 Cal. Code Reg. 2050.6, Petitioner requests that the State
3 Board agree to consider additional evidence not previously provided to the Regional
4 Board that includes Petitioner's Alternative RAP as well as other substantive comments
5 Petitioner intends to submit regarding the Draft RAP. Petitioner anticipated that the City
6 will comply with the requirements of the Order by submitting the Proposed RAP required
7 by Task No. 1 of the Order. Petitioner also anticipated being afforded an opportunity
8 during the 30 day public comment period to provide its comments to the Proposed RAP to
9 the Regional Board. Therefore, Petitioner respectfully requests that the State Board afford
10 it an opportunity at this time to provide its comments regarding the proposed remedial
11 alternatives for the Site.

12 Petitioner requests that the State Board agree to allow it to provide
13 additional evidence in support of the contentions raised in this Petition. Further,
14 Petitioner requests that the State Board conduct a hearing to consider testimony, other
15 evidence and argument regarding the issues raised in this Petition, pursuant to 23 Cal.
16 Code Reg. 2050.6.

17
18 Dated: September 13, 2004

Respectfully submitted,

19 **McDERMOTT WILL & EMERY LLP**

20
21 By: 
22 Mary Ellen Hogan
23 Attorneys for Petitioner
24 ASHLAND INC.